UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

KIMBERLY A. EATON,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 04-84-B-W***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the issue whether substantial evidence supports the commissioner's determination that the plaintiff, who alleges disability stemming from knee, wrist, back and head pain, is capable of making an adjustment to work existing in significant numbers in the national economy. I recommend that the decision of the commissioner be vacated and the case remanded for further development.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on March 11, 2005, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

administrative law judge found, in relevant part, that the plaintiff had degenerative disc disease of the lumbar spine and a knee strain, impairments that were severe but did not meet or equal any listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 3, Record at 20; that she lacked the residual functional capacity ("RFC") to lift and carry more than ten pounds, needed to be able to sit and stand at will, and was unable to perform work requiring climbing of ladders, ropes or scaffolds, repetitive climbing of ramps and stairs, repetitive stooping or crouching, or working in concentrated exposure to vibration and hazards, such as moving machinery and unprotected heights, Finding 5, *id*.; that if she were capable of performing a full range of sedentary work, Rule 201.29 of Table 1, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid") would direct a finding of not disabled, given her RFC, age as of the alleged onset of disability ("younger individual") and education (general equivalency diploma ("GED")), Findings 8-10, *id*. at 21; that, although strict application of this rule was not possible, using the Grid as a framework for decision-making, she was capable of making a successful vocational adjustment to work existing in significant numbers in the national economy, Findings 10-11, *id*.; and that she therefore had not been under a disability at any time through the date of decision, Finding 12, *id*.[2] The Appeals Council declined to review the decision, *id*. at 7-10, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981; 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the

[2] Inasmuch as the plaintiff had acquired sufficient quarters of coverage to remain insured for purposes of SSD through at *(continued on next page)*

conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than her past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff identifies five points of error, asserting that the administrative law judge (i) failed to properly assess her RFC, (ii) relied on the testimony of a vocational expert who failed to identify jobs she could perform, (iii) failed to properly assess her credibility, (iv) transmitted a flawed hypothetical question to the vocational expert, and (v) failed to apply Social Security Ruling 96-9p ("SSR 96-9p"). *See generally* Statement of Facts and Errors ("Statement of Errors") (Docket No. 12). I agree that the testimony of the vocational expert fails to meet the commissioner's Step 5 burden of proof.[3] On that basis, reversal and remand is warranted.[4]

I. Discussion

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least December 31, 2005, *see* Finding 1, Record at 20, there was no need to undertake a separate SSD analysis.

[3] In so finding, I rely primarily on the plaintiff's Point 2. I have touched on her remaining points only to the extent necessary to analyze whether the testimony of the vocational expert can serve as substantial evidence in this case.

[4] The plaintiff seeks remand for payment of benefits. *See* Statement of Errors at 11. In *Seavey v. Barnhart*, 276 F.3d 1, 11 (1st Cir. 2001), the First Circuit held that "ordinarily the court can order the agency to provide the relief it denied only in the unusual case in which the underlying facts and law are such that the agency has no discretion to act in any manner other than to award or to deny benefits." At oral argument, counsel for the plaintiff contended that this was one of those "unusual" cases given the combination of asserted errors. Nonetheless, I am unpersuaded that the outcome on remand is necessarily a foregone conclusion. Hence, remand with instruction to award benefits is inappropriate.

At hearing, the administrative law judge asked vocational expert Sherry Watson to assume a hypothetical claimant with restrictions set forth in Exhibit 26F – an RFC assessment completed by the plaintiff's treating physician's assistant, Linda Seabold, PA-C. *See* Record at 56, 59-61, 415-17. Watson testified that a person with those restrictions could perform work as a surveillance monitor, a messenger (although not the bicycle-riding type) and an interviewer. *See id*. at 61. Although she provided census codes for those occupations, she offered no codes from the Dictionary of Occupational Titles (U.S. Dep't of Labor, 4th ed. rev. 1991) ("DOT"). *See id*. at 56-69. Nonetheless, the administrative law judge did question whether her testimony was consistent with the DOT, and she assured him that, apart from one explained conflict not relevant to this discussion, it was. *See id*. at 61-62.

The plaintiff argues, *inter alia*, that the vocational-expert testimony in this case is too weak to sustain the commissioner's Step 5 burden. *See* Statement of Errors at 5-7. I agree. In her Statement of Errors, the plaintiff endeavored (with understandable difficulty) to match the jobs identified by Watson with entries in the DOT. *See id*. She discovered that, as best she could tell from the DOT, she would be unable to perform two of the three identified jobs (messenger and interviewer) even assuming *arguendo* the correctness of the administrative law judge's RFC determination. *See id*. at 6. For the following reasons, I agree:

1. Interviewer. The administrative law judge made no express finding that the plaintiff, who had a ninth-grade education and a GED, *see* Record at 27, had transferable skills, *see id.* at 20-21.[5] Not surprisingly, Watson assumed a hypothetical claimant who could perform entry-level work. *See id.* at 61. Such work corresponds to a specific vocational preparation ("SVP") level of 1-2; by contrast, semi-skilled

[5] The Grid rule on which the administrative law judge relied assumes transferable skills. *See* Finding 10, Record at 21; Rule

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work corresponds to an SVP level of 3-4, and skilled work to an SVP level of 5-9. *See, e.g.*, Social Security Ruling 00-4p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2004) ("SSR 00-4p"), at 245. The plaintiff identifies two DOT codes that might fit the job of interviewer identified by Watson: employment interviewer, DOT § 166.267-010, and loan interviewer, mortgage, DOT § 241.367-018. *See* Statement of Errors at 6. As she points out, both have SVP levels in excess of her apparent skill level (and in excess of those for an entry-level occupation). *See id*. at 6-7; *see also* DOT §§ 166.267-010 (SVP level of 6), 241.367-018 (SVP level of 6). I find two other DOT codes that might correspond with the interviewer job; however, they too have SVP levels significantly greater than those for entry-level work. *See* DOT §§ 166.267-022 (prisoner-classification interviewer; SVP level of 7), 168.267-038 (eligibility-and-occupancy interviewer; SVP level of 5).

2. Messenger. Seabold's RFC assessment, which Watson was asked to use as the basis for her jobs analysis, limits the plaintiff to lifting and carrying ten pounds occasionally (defined as 21 minutes per hour). *See* Record at 415. The administrative law judge explained to Watson: "This would really be limited to the sedentary level because of the lifting limitation[.]" *Id*. at 60-61. Watson testified that a person with the posited RFC could perform the job of messenger, although not the sort who rides bicycles across town. *See* Record at 61.[6] She described the work she had in mind as follows: "[T]he idea is someone would contact a number or an office – either by e-mail, computer, by telephone, walk into your office – and that person would take the message and get it to the appropriate person." *Id*. at 65. The plaintiff identifies one DOT code that appears to correspond to this job – that of messenger, copy, DOT § 239.677-010. *See*

201.29 of Table 1, Grid. However, in the absence of any discussion of the subject, this could as easily be a typographical error as a considered choice.

[6] While the administrative law judge did not ultimately adopt Seabold's RFC assessment *in toto*, *compare* Finding 5, Record at 20 *with id*. at 415-17, he did find the plaintiff limited to less than a full range of sedentary work, *see* Finding 10,

(continued on next page)

Statement of Errors as 6. As she points out, that job is classified as light work (which entails exerting up to twenty pounds of force occasionally). *See id*.; DOT § 239.677-010. I find one additional DOT code that might also correspond to Watson's messenger job, that of office helper, DOT § 239.567-010. However, it, too, is classified as a light job. *See* DOT § 239.567-010.

At oral argument, counsel for the commissioner did not address the apparent discrepancy between Watson's testimony and the DOT codes, stating instead that he had been unable to find any DOT codes corresponding with the jobs of interviewer and messenger as described by Watson. He nonetheless took the position that in this case the DOT simply is irrelevant. This is so, he posited, inasmuch as (i) Watson supplied census codes (in addition to relying on her own expertise), and (ii) Social Security regulations recognize that the commissioner may take administrative notice of census reports in determining whether work exists in significant numbers in the national economy. *See* 20 C.F.R. §§ 404.1566(d)(3), 416.966(d)(3).

In so arguing, he overlooked SSR 00-4p, which leaves no doubt that the DOT is in fact relevant in every case in which vocational testimony is taken. *See* SSR 00-4p at 244 ("In making disability determinations, we rely primarily on the DOT (including its companion publication, the SCO) for information about the requirements of work in the national economy. . . . Occupational evidence provided by a VE [vocational expert] or VS [vocational specialist] generally should be consistent with the occupational information supplied by the DOT. When there is an apparent unresolved conflict between VE or VS evidence and the DOT, the adjudicator must elicit a reasonable explanation for the conflict before relying on the VE or VS evidence to support a determination or decision about whether the claimant is disabled. At

id. at 21.

the hearings level, as part of the adjudicator's duty to fully develop the record, the adjudicator will inquire, on the record, as to whether or not there is such consistency."); *see also, e.g.*, *Anschutz v. Barnhart*, 212 F. Supp.2d 1077, 1085 (S.D. Iowa 2002) (in case in which vocational expert testified that his information derived from census codes and he assumed jobs also would be reflected in DOT, "[b]ecause he did not refer to the DOT, [he] did not identify specific jobs which could be performed given the residual functional capacity found by the ALJ at step 5 of the sequential evaluation").[7]

Although, in this case, the administrative law judge did in fact make the requisite DOT inquiry, he was misinformed that there was no conflict with respect to the interviewer and messenger jobs. Even assuming *arguendo* that counsel for the commissioner is correct that there is no corresponding DOT entry for the jobs of interviewer and messenger, that in itself is a "conflict" that demands explication and resolution. Inasmuch as this conflict was not even identified – let alone resolved – the commissioner failed to carry her burden of demonstrating that the plaintiff could perform either the messenger or the interviewer job. *See* SSR 00-4p at 246 ("The adjudicator will explain in the determination or decision how he or she resolved the conflict. The adjudicator must explain the resolution of the conflict irrespective of how the conflict was identified.").

This leaves one job: that of surveillance monitor, which both parties agree is reflected in the DOT. Although counsel for the commissioner was unable at oral argument to provide the exact citation, I agree with counsel for the plaintiff that it is DOT § 379.367-010 (surveillance-system monitor). As counsel for

[7] That the commissioner has elevated the DOT to this level of importance is unsurprising. As counsel for the commissioner acknowledged at oral argument, the census codes provide little detail regarding the capacities required to perform the jobs in question. *See, e.g.*, Occupational Classification Sys. Manual § D316 (United States Dep't of Labor, Bureau of Statistics), available at http://www.bls.gov/ncs/ocs/ocsm/comD316.Htm (describing the interviewer job as: "Interview people and compile statistical information on topics, such as public issues or consumer buying habits. May participate in Federal, state, or local population survey and be designated as a Census Enumerator. Include Patient *(continued on next page)*

the plaintiff observed, this is a sedentary job, defined as a job that "involves sitting most of the time, but may involve walking or standing for brief periods of time." DOT § 379.367-010. Seabold's RFC assessment states that the plaintiff must "[a]lternate sit/stand/walk." Record at 416. Yet, testimony elicited by the plaintiff's counsel on cross-examination suggests that Watson initially overlooked the "walk" component and, when asked to consider it, acknowledged it might erode the job base by some unquantified amount:

> Q [T]he surveillance monitor, the 37 in Maine or 6,300 in U.S., they do what?
>
> A They watch television screens, mostly. In different buildings, usually public buildings or banks.
>
> Q And they're sitting and standing at will?
>
> A They can sit or stand.
>
> Q Can they walk?
>
> A They might be able to walk around in the room and still watch the monitor. Depends on the setup.
>
> Q Okay.
>
> A Depends on where it is.
>
> Q Okay, so the walk option, if they have to walk at will, would that eliminate any of those three jobs –
>
> A That might be – well –
>
> Q – you identified?
>
> A – it might. It might – I can't really imagine – walk around taking messages – the interviewer might be difficult. But you're on the phone, so maybe you can. But I'm sure that there are a percentage of these jobs that the employer will say, no, the individual will sit.

Registrar, Field Reviewer, Survey Interviewer.").

***

Q Would that eliminate some of the jobs, you think?

A Probably.

Q Or some of the employers?

A Yes.

Q To the degree that it would, you don't know?

A I don't know the degree that it would.

Id. at 65-67. As the plaintiff posits, Watson's testimony – as clarified in this exchange – is too vague and uncertain to meet the commissioner's burden of showing that, with respect to a person in need of a sit-stand-walk option, the surveillance-system-monitor job (and the other two identified jobs of messenger and interviewer) existed in significant numbers in the national economy. *See* Statement of Errors at 10-11.

A final point remains. One might protest that this particular error was harmless inasmuch as the administrative law judge ultimately did not adopt the sit-stand-walk option reflected in the Seabold RFC assessment, instead finding that the plaintiff needed to alternate only sitting and standing at will. *See* Finding 5, Record at 20. Nonetheless there is a separate problem, to which the plaintiff alludes in attacking the administrative law judge's RFC finding as flawed, *see* Statement of Errors at 2-5, and in describing Dr. Pavlak's RFC assessment as "unchallenged[,]" *see id*. at 6.

As noted above, at Step 5, the record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's RFC to perform work other than past relevant work. *See, e.g., Rosado*, 807 F.2d at 294. Ordinarily, an administrative law judge is not qualified to translate raw medical data into an RFC; he must rely on medical expertise to do so. *See, e.g., Gordils v. Secretary of*

Health & Human Servs., 921 F.2d 327, 329 (1st Cir. 1990) (although an administrative law judge is not precluded from "rendering common-sense judgments about functional capacity based on medical findings," he "is not qualified to assess residual functional capacity based on a bare medical record"). The question whether the plaintiff required a sit-stand or a sit-stand-walk option was not one that lent itself to a "common-sense judgment."

The Record contains three RFC assessments completed by medical personnel.[8] Both of the plaintiff's treating sources, Seabold and Dr. Pavlak, indicated that she required a sit-stand-walk option. *See* Record at 416, 422. A Disability Determination Services ("DDS") non-examining physician, Robert Hayes, D.O., opined that the plaintiff could, *inter alia*, lift up to fifty pounds occasionally and twenty-five pounds frequently, stand and/or walk with normal breaks for about six hours in an eight-hour workday and sit for about six hours in eight-hour workday. *See id*. at 319. He did not check a box indicating that the plaintiff required a sit-stand option. *See id*. Yet, as counsel for the commissioner acknowledged at oral argument, the administrative law judge discounted this portion of Dr. Hayes' report. He stated: "Due to new and material evidence, including the testimony at hearing, the findings of the medical experts at the state Disability Determination Services are found to be no longer consistent with the record as a whole. Therefore, their findings are given less weight by the undersigned." *Id*. at 19. He did not adopt a single one of the aforementioned RFC findings of Dr. Hayes. *See* Finding 5, *id*. at 20 (plaintiff limited to lifting and carrying no more than ten pounds and must be able to sit and stand at will). With the relevant portion of the Hayes report discounted, there remained no positive, probative evidence that the plaintiff could perform the

[8] A fourth RFC assessment was completed by a Single Decision Maker, who evidently was a layperson. *See* Record at 71, 215-22.

aforesaid jobs with a sit-stand, as opposed to a sit-stand-walk, option. Accordingly, the commissioner failed to carry her burden that the plaintiff was capable of performing the surveillance-system-monitor job.[9]

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **VACATED** and the case **REMANDED** for further proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 14th day of March, 2005.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

[9] At oral argument, counsel for the commissioner acknowledged that the plaintiff required a sit-stand option (as found by the administrative law judge) but contended that there was no "positive evidence" of record that she also needed to be able to walk at will. He argued that this was so inasmuch as Seabold indicated she was capable of standing/walking for thirty minutes in an hour and Dr. Pavlak stated she was capable of standing/walking for twenty-one minutes in an hour. *See* Record at 415, 421. Nonetheless, both practitioners also checked a box indicating that she required a "sit/stand/walk" option. *See id*. at 416, 422. The two types of findings are not necessarily inconsistent. A person could possess the capacity to stand for thirty minutes in an hour, yet need to do that amount of standing at will.

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